Belcor, Inc., d/b/a Franciscan Convalescent Hospital *and* Hospital & Institutional Workers Union, Local No. 250, Service Employees International Union, AFL-CIO. Case 32-CA-3153

June 12, 1981

DECISION AND ORDER

Upon a charge filed on October 22, 1980, by Hospital & Institutional Workers Union, Local No. 250, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Belcor, Inc., d/b/a Franciscan Convalescent Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on October 27, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 22, 1980, following a Board election in Case 23-RC-795, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 30, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Further, since on or about September 30, 1980, Respondent has failed and refused to supply information requested by the Union regarding, *inter alia*, names, rates of pay, and job classifications of unit employees. On November 7, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. In essence, Respondent denies the appropriateness of the unit, that the Union is the exclusive representative of the employees in the unit, that the specific information requested by the Union (e.g., names, rates of pay, and job classifications of the employees in the unit) is necessary or relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the unit, and that it has failed and refused to bargain with the Union or that it has violated Section 8(a)(5) and (1) of the Act. Affirmatively, Respondent alleges that the certification issued by the Board was "faulty, void, invalid and contrary to law."

On December 4, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 15, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, on December 23, 1980, the Charging Party filed a joinder in Motion for Summary Judgment and request for litigation expenses. On December 29, 1980, Respondent filed a response to the Notice To Show Cause, entitled "Opposition to General Counsel's Motion for Summary Judgment and Charging Party's Request for Litigation Expenses."

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause, Respondent alleges that the General Counsel's Motion for Summary Judgment is inappropriate inasmuch as there are a number of substantial and factual issues which remain unresolved.[2] Specifically, Respondent asserts that the underlying representation election did not constitute an accurate indication of employee preference as the employees were unlawfully influenced by alleged preelection conduct of union representatives and Board agents, and by certain allegedly improper acts committed by Board agents and union representatives during the election. Respondent also asserts that the Board

[1] Official notice is taken of the record in the representation proceeding, Case 32-RC-795, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondent states that the General Counsel failed to include with his Motion for Summary Judgment Respondent's request for review of the Regional Director's Supplemental Decision and Certification of Representative, as well as exhibits attached thereto. Respondent has requested that the Board order the Region to Furnish these documents so that the Board may make a proper resolution of the General Counsel's Motion for Summary Judgment. As reference was made to Respondent's request for review in the Motion for Summary Judgment, the General Counsel should have included a copy of the request for review and attached exhibits. However, inasmuch as Respondent's request for review with attached exhibits previously had been filed with and considered by the Board as part of the record in Case 32-RC-795, and is presently available, we take administrative notice of it and make it part of the record in the instant case. Further, Respondent states that, contrary to the General Counsel's assertions in his Motion for Summary Judgment, Respondent's answer to the complaint admitted that John Spittler was the administrator of the Hospital and a supervisor within the meaning of the Act only for the period ending November 29, 1979, and affirmatively alleged that John Sears was the administrator and a supervisor for the period beginning August 18, 1980, and continuing to date. We have examined Respondent's answer and note the accuracy of Respondent's statement above.

has erroneously failed and refused to afford Respondent an evidentiary hearing in that the hearing held on its objections to the election was improperly limited in scope, and its objections were improperly overruled. Additionally, Respondent states that the election was not held in a unit appropriate for the purposes of collective bargaining. Finally, Respondent states that the Charging Party's request for litigation expenses should be denied as such an award would be erroneous under present Board law.

Review of the record herein, including the record in Case 32-RC-795, reveals that, upon a petition duly filed under Section 9(c) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board. Thereafter, the Acting Regional Director issued a Decision and Direction of Election, wherein he found that the petitioned-for unit of all housekeeping department employees including housekeepers, maintenance, janitors, laundry workers; dietary department, including cooks, kitchen helpers; nursing department, including licensed vocational nurses, nurses aides/assistants, orderlies, certified nursing assistants, activities director and director of staff development, employed by the Employer at its Merced, California, facility; excluding registered nurses, office clerical employees, engineers, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining. On October 30, 1979, the Respondent filed a request for review of the Acting Regional Director's Decision and Direction of Election in which Respondent alleged, *inter alia*, that its licensed practical nurses, activities director, and staff director of development should not be included in the unit because they are either supervisors, professional employees, managerial employees, or they lack a community of interest with other members of the unit found to be appropriate. By telegraphic order on November 16, 1979, the Board denied Respondent's request for review.

On November 16, 1979, a secret-ballot election was held among employees in the aforementioned unit. The tally of ballots shows that the Union won the election. On November 23, 1979, Respondent filed timely objections to conduct affecting the results of the election. After investigating the objections, the Regional Director, on January 25, 1980,[3] issued his Supplemental Decision, Order, and Notice of Hearing, in which he directed a hearing on Respondent's objection alleging that the Union promised its supporters a reduction in initiation fees and those portions of objections which alleged that the Union made material misrepresentations concerning wage increases negotiated between the Union and five other facilities of the Employer. He recommended that Respondent's other objections be overruled in their entirety. On February 16 Respondent filed a request for review of the Regional Director's Supplemental Decision in which it contended that the Regional Director erred by failing to sustain or recommend a hearing on Respondent's objections concerning, *inter alia*, alleged deficiencies in the Board's Notice of Election, alleged improper acts committed by Board agents and union representatives during the election, and alleged material misrepresentations made by union representatives shortly before the election. By telegraphic order of March 7 the Board denied Respondent's request for review. On April 21, a hearing was held on those objections which were not overruled by the Regional Director. On June 12 the Hearing Officer issued his Report on Objections in which he recommended that all the objections be overruled in their entirety. On July 1 Respondent filed with the Regional Director exceptions to the Hearing Officer's report and a supporting brief contending, *inter alia*, that the Hearing Officer's recommendations were based on improper credibility resolutions and incorrect applicad promised its supporters a reduction in initiation fees and those portions of objections which alleged that the Union made material misrepresentations concerning wage increases negotiated between the Union and five other facilities of the Employer. He recommended that Respondent's other objections be overruled in their entirety. On February 16 Respondent filed a request for review of the Regional Director's Supplemental Decision in which it contended that the Regional Director erred by failing to sustain or recommend a hearing on Respondent's objections concerning, *inter alia*, alleged deficiencies in the Board's Notice of Election, alleged improper acts committed by Board agents and union representatives during the election, and alleged material misrepresentations made by union representatives shortly before the election. By telegraphic order of March 7 the Board denied Respondent's request for review. On April 21, a hearing was held on those objections which were not overruled by the Regional Director. On June 12 the Hearing Officer issued his Report on Objections in which he recommended that all the objections be overruled in their entirety. On July 1 Respondent filed with the Regional Director exceptions to the Hearing Officer's report and a supporting brief contending, *inter alia*, that the Hearing Officer's recommendations were based on improper credibility resolutions and incorrect application of Board law. On July 18, the Regional Director issued his Second Supplemental

[3] All dates hereinafter are in 1980 unless otherwise indicated.

Decision and Certification of Representative, in which he adopted the Hearing Officer's recommended disposition of Respondent's objections. Thereafter, on August 11, Respondent filed a request for review with the Board, essentially reiterating the arguments presented in its exceptions to the Hearing Officer's report. By telegraphic order of September 22 the Board denied Respondent's request for review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Belcor, Inc., d/b/a Franciscan Convalescent Hospital, a California corporation with an office and place of business in Merced, California, has been engaged in the operation of a proprietary convalescent hospital. During the past 12 months, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $100,000 and has received revenues in excess of $10,000 from Medi-Cal.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Hospital & Institutional Workers Union, Local No. 250, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All housekeeping department employees including housekeepers, maintenance, janitors, laundry workers; dietary department, including cooks, kitchen helpers; nursing department including licensed vocational nurses, nurses aides/assistants, orderlies, certified nursing assistants, activities directors, and director of staff development, employed by Respondent at its Merced, California facility; excluding registered nurses, office clerical employees, engineers, guards, and supervisors as defined in the Act.

2. The certification

On November 16, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 22, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 25, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 30, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Commencing on or about September 25, 1980, and at all times thereafter, the Union, by letter, has requested Respondent to furnish the Union with the name of each employee in the bargaining unit, with his or her address, telephone number, social security number, date of hire, rate of pay, classification, and marital or dependent status; copies of fringe benefit programs currently in effect for unit

employees including copies of the policies, the policy booklets, if any, and the costs of the policies to the Company and/or the employee; copies of any personnel handbook given to employees; and copies of any written rules or regulations and/or policies or procedures, which are currently in effect governing the personnel relations in the bargaining unit. This information is necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees. Since on or about September 30, 1980, Respondent has failed and refused to furnish the Union with the information described above.

Accordingly, we find that Respondent has, since September 30, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and has failed and refused to provide the Union with information requested which is relevant to the Union in its role as bargaining representative. By such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, supply the requested information and bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.[5]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Belcor, Inc., d/b/a Franciscan Convalescent Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Institutional Workers Union, Local No. 250, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All housekeeping department employees including housekeepers, maintenance, janitors, laundry workers; dietary department, including cooks, kitchen helpers; nursing department including licensed vocational nurses, nurses aides/assistants, orderlies, certified nursing assistants, activities directors, and director of staff development, employed by Respondent at its Merced, California, facility; excluding registered nurses, office clerical employees, engineers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 22, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 30, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing to furnish the Union with the information it requested in its letter of September 25, 1980, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has en-

[5] The Charging Party's request that Respondent be directed to reimburse it for the expenses incurred in litigating this matter is denied as we do not find Respondent's defenses herein to be frivolous. See *Monarch Federal Savings & Loan Association*, 241 NLRB 893 (1979), and cases cited therein.

gaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Belcor, Inc., d/b/a Franciscan Convalescent Hospital, Merced, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital & Institutional Workers Union, Local No. 250, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All housekeeping department employees including housekeepers, maintenance, janitors, laundry workers; dietary department, including cooks, kitchen helpers; nursing department, including licensed vocational nurses, nurses aides/assistants, orderlies, certified nursing assistants, activities directors, and director of staff development, employed by Respondent at its Merced, California facility; excluding registered nurses, office clerical employees, engineers, guards, and supervisors as defined in the Act.

(b) Refusing to supply the aforesaid labor organization with information necessary for collective bargaining, including the names of each employee in the bargaining unit, with his or her address, telephone number, social security number, date of hire, rates of pay, classification, and marital status; copies of fringe benefit programs currently in effect for unit employees including copies of the policies, the policy booklets, if any, and the cost of the policies to the Company and/or the employees; copies of any personnel handbook given to employees; and copies of any written rules or regulations and/or policies or procedures, which are currently in effect governing the personnel relations in the bargaining unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request supply the above-named labor organization with information necessary for collective bargaining, including the names of each employee in the bargaining unit, with his or her address, telephone number, social security number, date of hire, rates of pay, classification, and marital status; copies of fringe benefit programs currently in effect for unit employees including copies of the policies, the policy booklets, if any, and the cost of the policies to the Company and/or the employees; copies of any personnel handbook given to employees; and copies of any written rules or regulations and/or policies or procedures, which are currently in effect governing the personnel relations in the bargaining unit.

(c) Post at its office and place of business at 3169 "M" Street, Merced, California, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital & Institutional Workers Union,

Local No. 250, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, including the names of each employee in the bargaining unit, with his or her address, telephone number, social security number, date of hire, rates of pay, classification, and marital status; copies of fringe benefit programs currently in effect for unit employees including copies of the policies to the Company and/or the employees; copies of any personnel handbook given to employees; and copies of any written rules or regulations and/or policies or procedures, which are currently in effect governing the personnel relations in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All housekeeping department employees including housekeepers, maintenance, janitors, laundry workers; dietary department, including cooks, kitchen helpers; nursing department including licensed vocational nurses, nurses aides/assistants, orderlies, certified nursing assistants, activities directors, and director of staff development, employed by Respondent at its Merced, California facility; excluding registered nurses, office clerical employees, engineers, guards, and supervisors as defined in the Act.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining, including the names of each employee in the bargaining unit, with his or her address, telephone number, social security number, date of hire, rates of pay, classification, and marital status; copies of fringe benefit programs currently in effect for unit employees including copies of the policies, the policy booklets, if any, and the cost of the policies to the Company and/or the employees; copies of any personnel handbook given to employees, and copies of any written rules or regulations and/or policies or procedures, which are currently in effect governing the personnel relations in the bargaining unit.

BELCOR, INC., D/B/A FRANCISCAN CONVALESCENT HOSPITAL